

No. 48406-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Paul Bickle,

Appellant.

Lewis County Superior Court Cause No. 10-1-00746-1

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion as a matter of law by failing to exercise discretion on the issue of concurrent sentencing.

ISSUE 1: May a sentencing court revisit an offender's sentence after subsequent imposition of a consecutive sentence by a different sentencing court?

2. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 2: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Paul Bickle is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2011, Paul Bickle pled guilty to theft two, burglary two, and three counts of theft of a motor vehicle in Lewis county. The court imposed a sentence of 68 months. The court noted that the sentence would run concurrent with another sentence from Whitman county, which was imposed months earlier. CP 20-28; 32-42.

He was transported to Pierce county and convicted of an offense there. He received a sentence of 43 months.¹ CP 8, 44-54.

In October of 2015, Mr. Bickle filed a Motion to Modify or Correct Judgment and Sentence in Lewis county. CP 7-12. He asked the court to direct that both of his felony sentences be run concurrently. CP 7-12.

The sentencing judge held a hearing. RP (12/2/15) 2-13. The court told Mr. Bickle that he did not have the authority to order the sentences be served concurrently.² RP (12/2/15) 11; CP 61. Mr. Bickle timely appealed. CP 62.

¹ That court noted that the sentences in Pierce county were to run concurrently to each other and "consecutive to all other cause #'s and DOC sentences". CP 51.

² The trial judge also noted that he remembered declining to run the sentence consecutive with any other case, but the Judgement and Sentence does not reflect this. RP (12/2/15) 11; CP 32-42.

ARGUMENT

I. THE LEWIS COUNTY SUPERIOR COURT ERRED BY CONCLUDING THAT IT LACKED AUTHORITY TO REVISIT MR. BICKLE’S SENTENCE, IN LIGHT OF THE SUBSEQUENT CONSECUTIVE SENTENCE IMPOSED IN PIERCE COUNTY.

With limited exceptions, a sentencing court has unfettered discretion to impose any sentence concurrently with a prior sentence. *State v. Grayson*, 130 Wn. App. 782, 786, 125 P.3d 169, 171 (2005) (citing RCW 9.94A.589(3)). When a person is sentenced by two different courts, the statute gives the second court discretion to determine whether a concurrent or consecutive sentence is appropriate. RCW 9.94A.589(3).

However, nothing in the statute restricts the prior sentencing court from revisiting an earlier sentence after subsequent imposition of a consecutive sentence by another sentencing court. Nor is there any other statutory prohibition against modification of an earlier sentence after subsequent imposition of a consecutive sentence on another matter.³

Failure to exercise discretion is an abuse of discretion.

Amalgamated Transit Union Local No. 1576 v. Snohomish Cty. Pub. Transp. Ben. Area, 178 Wn. App. 566, 577 n. 29, 316 P.3d 1103, 1109 (2013); *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d

³ The sole exception is where the second offense was committed while the offender was “under sentence for conviction of a felony” and commits another felony. RCW 9.94A.589(2).

643, 648 (1999); *see also In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677, 683 (2007).

Here, the sentencing court had discretion to revisit Mr. Bickle's sentence, in light of the Pierce County court's decision to impose a consecutive sentence. The court's failure to exercise discretion amounted to an abuse of discretion. *Cf. Mulholland*, 161 Wn.2d at 332.

Mr. Bickle's case must be remanded to the Lewis County Superior Court. On remand, the court may reconsider its sentence, in light of the subsequent imposition of a consecutive sentence. *Id.*

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 385-394, 367 P.3d 612 (2016).⁴

⁴ Division II's commissioner has indicated that Division II will follow *Sinclair*.

Appellate costs are “indisputably” discretionary in nature. , *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wash.2d 827, 344 P.3d 680 (2015).

Mr.Bickle is indigent. There is no reason to conclude that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

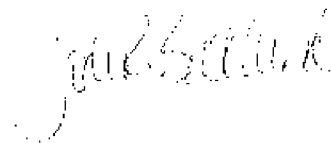
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The Court of Appeals should remand Mr. Bickle’s case to the Lewis County Superior Court for reconsideration of his sentence.

Respectfully submitted on May 10, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Paul Bickle, DOC #743245
Washington Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

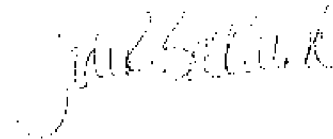
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 10, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

May 10, 2016 - 1:51 PM

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